BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CRYSTLE MCCULLOUGH	)	
Claimant	)	
V.	)	
	)	
LEXINGTON PARK NURSING	)	Docket No. 1,077,770
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), through William L. Townsley, III, request review of Administrative Law Judge Steven M. Roth's September 8, 2016 preliminary hearing Order. Roger D. Fincher appeared for claimant. The record on appeal is the same as that considered by the judge.

ISSUE

The judge concluded claimant sustained a compensable right shoulder injury by accident on February 28, 2016, including that respondent had timely notice of the injury by accident. Respondent argues claimant did not provide appropriate or timely notice and the Order should be reversed,[1] while claimant wants the Order affirmed. Therefore, the issue is: did claimant provide appropriate and timely notice of her injury by accident?

FINDINGS OF FACT

In October 2015, claimant began working as a CNA for respondent, a nursing care facility. Claimant denied having right shoulder problems when she started working for respondent. She testified that between 6:00 and 6:30 a.m. on February 28, 2016,[2] she was team lifting a resident when she felt an immediate pop and sharp pain down her right arm. She did not report the accident and finished her shift. Claimant thought she had a muscle strain that would resolve.[3] After being off work a day or two, she continued to perform her regular duties, but testified her pain gradually worsened.

---

[1] Respondent's "Request for Review" disputes whether claimant's injury arose out of and in the course of her employment. However, pg. 4 of respondent's brief states, "This is a notice case." As such, the undersigned Board Member has opted to focus on the notice issue only.

[2] All additional dates refer to 2016.

[3] Claimant has a history of right shoulder problems. She testified her shoulder dislocated or popped out of joint during her youth and required reductions under anesthesia, the last time in 2005.

Respondent's employee handbook states:

> It is the responsibility of the injured employee to **immediately** notify the employer of any work-related injury. Notification can be made by contacting the Administrator, Executive Director, Director of Nursing, Residential Care Coordinator, or Charge Nurse/Supervisor at the time of the injury. Failure to notify the employer may result in denial of the claim and may result in disciplinary action for not following company policy.
>
> Any employee who sustains an injury at work is required to fill out an Employee Incident Report form prior to leaving work the date of the injury unless emergency services are required.
>
> Any employee who sustains an injury at work which requires physician attention will be required to go to an Occupational Health Clinic. A supervisor will instruct the employee on a local facility.[4]

On March 5, claimant went on her own to the Stormont-Vail emergency room. She reported a gradual worsening of right shoulder pain after lifting patients at work about a week earlier, in addition to decreased range of motion and popping. Claimant also reported a history of shoulder pain years ago, including dislocations, while also noting "increased right shoulder pain after lifting patients at work."[5] Emergency room personnel evaluated claimant and obtained right shoulder x-rays. A nurse noted, "**Right shoulder pain (has had for several years); worse over the last week; no new injury known**."[6] Claimant was diagnosed with a right shoulder injury and pain. The nurse also noted while claimant had right shoulder pain for years, she also contended "right shoulder hurt more after lifting patients at work."[7] She was given a sling, prescribed pain medication, referred to an orthopedic surgeon and given the following light duty note:

> Dear School Nurse/Human Resources Officer:
>
> Crystle McCullough was seen and treated in our emergency department on 3/5/2016. She may return to work on March 5, 2016. [P]atient will need to be on weight limit lifting restriction and can wear her sling to work as needed until evaluated by ortho.[8]

---

[4] P.H. Trans., Resp. Ex. A at 2 (emphasis in original).

[5] *Id*., Resp. Ex. B at 2.

[6] *Id*., Resp. Ex. B at 3 (bold in original).

[7] *Id*., Resp. Ex. B at 4.

[8] *Id*., Cl. Ex. 4; see also *Id*., Resp. Ex. C.

Either that same day or the following day, claimant delivered copies of the note to the facility administrator, area manager, director of nursing, charge nurse and office. Because it was the weekend, she handed the note to those individuals who were working and slid the rest of the copies under office doors of people who were not working. According to claimant, she spoke with two nurses "at the desk[,]"[9] Beth and Megan, about previously hurting herself when lifting a particular resident. When asked if these nurses were in a supervisory capacity, claimant testified, "As far as I knew, they were the registered nurses which are the people I would report to about my residents."[10] Claimant's last day of physical work for respondent was March 6.

Michelle Hunter, respondent's business office manager, handles workers compensation claims. Hunter testified March 7 was the first time she heard claimant's name in connection with a workplace injury, when someone handed Hunter claimant's work restrictions. Hunter next communicated with claimant by phone. She testified:

> When I called her, I asked what happened. And she told me that when she was transferring a resident, she felt a pull. And she gave her testimony to me or told me what was going on. And I asked her, had you already been hurt? She said her shoulder was already messed up. And I just wrote what was said over the phone. Had not had a problem in a long time. Felt a pull. And went to the doctor. She said she aggravated it working. I asked, if you wanted to fill out a Work Comp claim? That's my job to do that. And she told me twice, she doesn't think she wanted to do it at that time. She said she didn't think it happened at work.[11]

In sum, Hunter indicated claimant said her work aggravated a preexisting shoulder condition, but it did not happen at work and she did not want to pursue a workers compensation claim at the time of their conversation. Hunter testified she did not know during this conversation that claimant was alleging an injury on February 28 when performing a team lift of a resident, but she understood claimant hurt her shoulder while transferring a resident. Hunter also testified she and claimant discussed claimant's asserted accidental injury as testified to by claimant at the preliminary hearing.

Sometime later, claimant received a call from respondent's staff saying she was removed from the schedule until further notice because respondent did not accommodate injuries that were not work related. At some point, claimant received a call from the director of nursing, Steve Ramos, saying respondent would end her employment. Respondent terminated claimant's employment effective March 15.

---

[9] *Id*. at 17.

[10] *Id*. at 22.

[11] *Id*. at 41; see also *Id*., Resp. Ex. D.

On March 17, claimant hand-delivered the following typed document to respondent:

> This is to inform you that on February 28, 2016 I injured myself while working for you. Sometime around 6:00 a.m. that morning I injured my right shoulder when lifting a resident. I am requesting workers' [sic] compensation benefits. I am requesting medical treatment for my right shoulder and payment of temporary total disability benefits beginning March 16, 2016. If these benefits are not provided within seven days I will file an Application for Preliminary Hearing with the Kansas Division of Work Comp.[12]

Hunter testified she was unaware claimant was asserting a workers compensation claim until receipt of the written document.

On June 7, claimant saw Edward Prostic, M.D., at her attorney's request. Claimant reported injuring her right shoulder on February 28 while team-lifting a resident. She complained of right shoulder pain, difficulty lying on her right side and reaching above shoulder level, and clicking and popping. Dr. Prostic diagnosed claimant with what appeared to be a SLAP tear. Dr. Prostic recommended surgery if a SLAP tear was documented on an MRI. Dr. Prostic opined claimant's work accident was the prevailing factor causing her injury, medical condition and need for medical treatment.

The judge's Order stated:

> Concerns of timely notice are also overcome by present evidence. Claimant informed Ms. Canady-Hunter of the occurrence of the accident within seven or less days of the event while Claimant was still employed. The discussion's context on March 7 was Claimant's recent medical visit and her restrictions. The discussion also included the report of the February 28 accident. Granted, Claimant at that time did not directly attribute her injury as solely based on the accident and expressed no present interest in filing a claim initially. That initial equivocation, however, is not inherently fatal as to notice and her current subsequent claim. *Garner v. Kitselman Construction, LLC.,* No. 1,069,084 (Kan.WCAB) May, 2016.
>
> Even if it were, the formal notice of claim by Claimant's attorney dated March 17. This notice was one day after Claimant's termination on March 15, two days after she was let go by the Respondent.[13]

Respondent appealed.

---

[12] *Id*., Cl. Ex. 2. As of July 1, 1987, the Kansas Legislature opted to use the term "workers compensation" without an apostrophe. Claimant's use of an apostrophe is understandable; she is not an attorney or a paralegal.

[13] ALJ Order at 3-4.

PRINCIPLES OF LAW

K.S.A. 2015 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 2015 Supp. 44-501b(c) and K.S.A. 2015 Supp. 44-508(h), the burden of proof is on the claimant to establish the right to an award of compensation, using a more probably true than not true standard and consideration of the whole record.

The notice statute has traditionally been viewed as a procedural statute.[14] K.S.A. 2015 Supp. 44-520 states:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
>
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.
>
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
>
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

---

[14] *Kansas Workers Compensation* (Kansas Bar Association, 4th Edition, § 12.03 A. (2000)). See also *Pyeatt v. Roadway Express, Inc.*, 243 Kan. 200, 205, 756 P.2d 438 (1988) (The written notice statute, which had substantially the same purpose of our notice statute, imposes a procedural requirement.).

> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
>
> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Kansas workers compensation appellate cases emphasize literally interpreting and applying plainly-worded workers compensation statutes.[15] The text of a statute should not be supplanted by information outside the plain wording of a statute.[16] *Hoesli*[17] states:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007). We determine legislative intent by first applying the meaning of the statute's text to the specific situation in controversy. See *State v. Phillips*, 299 Kan. 479, 495, 325 P.3d 1095 (2014) (first task in construing statute is to ascertain legislative intent through analysis of language employed, giving ordinary words their ordinary meanings). A court does not read into the statute words not readily found there. *Whaley*, 301 Kan. at 196, 343 P.3d 63; *Graham*, 284 Kan. at 554, 161 P.3d 695; see *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 525, 154 P.3d 494 (2007). When the language is unclear or ambiguous, the court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain the statute's meaning. *Whaley*, 301 Kan. at 196, 343 P.3d 63.

K.S.A. 2015 Supp. 44-523(a) states:

> The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, ensure the employee and the employer an expeditious hearing and act reasonably without partiality.

---

[15] See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[16] See *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 560-61, 293 P.3d 723 (2013).

[17] *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 362, 361 P.3d 504 (2015).

ANALYSIS

Respondent argues claimant provided notice on March 17, 11 days after her last day worked on March 6, which would make notice one day late. Respondent contends claimant never provided it with the specifics of her asserted accident until March 17 and argues claimant's conversation with Hunter on March 7 did not include the time, date, place, person injured and particulars of such injury. Further, respondent asserts the content of the March 7 conversation did not put respondent on notice that claimant was claiming benefits under the workers compensation act.

Without much need for elaboration, claimant undoubtedly told Hunter in their March 7 conversation that she was the person injured, she injured her shoulder from lifting a resident and her injury happened at respondent's facility. Therefore, the place, person injured and particulars are satisfied. Arguably, whether claimant provided the date and time of her accident is murky. Claimant testified she was hurt between 6:00 and 6:30 a.m. on February 28, but her testimony is silent as to whether she gave that specific information to Hunter. After claimant's testimony that she was hurt in a half-hour window the morning of February 28, Hunter testified she and claimant discussed on March 7 the injury by accident which claimant described to the judge. Hunter also indicated she did not understand, based on her conversation with claimant, that the accident occurred on February 28. Based on the evidence, the judge specifically concluded claimant reported her February 28 injury by accident to Hunter on March 7.

The undersigned Board Member defers to the judge's interpretation of the evidence that claimant provided timely notice on March 7, when claimant and Hunter discussed claimant having injured her shoulder at work.

Respondent requires workers immediately report injuries, fill out an incident report and go to a designated occupational health clinic. Such requirements are legally irrelevant and contrary to Kansas law. The Kansas statute regarding notice is spelled out above and contains no such requirements.

Claimant's statements that she did not want to pursue workers compensation or possibly that her injury did not happen at work do not "undo" the fact that she provided notice. While claimant initially indicated she was not claiming benefits under the workers compensation act, she indicated she injured her shoulder at work. Because K.S.A. 2015 Supp. 44-520(a)(4) requires either that it be apparent the employee is claiming benefits under the workers compensation act *or* has suffered a work-related injury, claimant need not do both to provide notice.

CONCLUSION

Claimant provided timely notice on March 7, 2016.

WHEREFORE, the Board affirms the September 8, 2016 Order.[18]

IT IS SO ORDERED.

Dated this _____ day of November, 2016.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

ec: Roger D. Fincher
roger@fincherlawoffice.com
debbie@fincherlawoffice.com
tammy@fincherlawoffice.com

William L. Townsley, III
wtownsley@fleeson.com
pwilson@fleeson.com

Honorable Steven M. Roth

[18] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.